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No. 77-1552

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN H. WEIDMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 16a-31a) is reported at 572 F.2d 1199.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1978. The petition for a writ of certiorari was filed on April 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied access to potential impeachment evidence by the prosecutor in violation of *Brady* v. *Maryland*, 373 U.S. 83, or the Jencks Act, 18 U.S.C. 3500.

2. Whether evidence of prior similar acts was properly admitted into evidence.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of 14 counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of two years' imprisonment, all except six months of which was suspended in favor of probation, and was fined $10,000.[1] The court of appeals affirmed (Pet. App. 16a-31a).

The evidence, the sufficiency of which petitioner does not challenge, showed that petitioner and other supervisory personnel of the Walsh Construction Company engaged in a scheme to defraud that company and Bethlehem Steel Corporation by obtaining for their own personal use money, goods, and services and charging either Walsh or Bethlehem for the same, purportedly as expenses related to a large construction project Walsh was performing for Bethlehem at Burns Harbor, Indiana (Pet. App. 16a-17a). During the period covered by the indictment, petitioner was the manager of Walsh's district office in Gary, Indiana and, after 1972, president of Walsh (Tr. 3365, 3368, 3376, 3395).

[1] Petitioner and 21 other individuals were initially indicted on 22 mail fraud counts, four perjury counts, and one conspiracy count. As a result of various plea agreements, the indictment was dismissed as to 20 of the individuals, and only petitioner and co-defendant Thomas McGrath went on trial. The perjury counts and six mail fraud counts were dropped prior to trial, and petitioner was acquitted of 12 of the remaining mail fraud counts. Co-defendant McGrath was acquitted of all charges (Pet. App. 16a-17a).

ARGUMENT

1. Petitioner contends (Pet. 9-17) that the government violated the requirements of *Brady* v. *Maryland*, 373 U.S. 83, and the Jencks Act, 18 U.S.C. 3500, by failing to disclose an "NLRB file" (Pet. 9) relating to one of the government's witnesses, Walter Cox. The facts pertaining to that contention are as follows:

Cox, Walsh's master mechanic at the Burns Harbor project, was one of the government's witnesses at the trial. On cross-examination, petitioner's counsel inquired at length about Cox's extensive involvement in the fraudulent scheme and elicited Cox's admissions concerning, *inter alia*, his own plea bargain with the government and his agreement to cooperate with the prosecution, the grant of immunity under which he was testifying, and his personal animosity against petitioner and his co-defendant McGrath resulting from petitioner's having discharged him from

Walsh (Tr. 2444-2448, 2456-2458, 2465-2466, 2517, 2572, 2574). Cox also stated that he had filed a complaint against Walsh with the National Labor Relations Board concerning his discharge, had made statements to the Board in connection with the complaint, but had withdrawn the complaint because he had refused to execute any affidavits with the Board (Tr. 2453-2494). Petitioner's counsel then asked Cox whether the FBI had ever "raised [the] incident" concerning Cox's Labor Board complaint with Cox, and Cox responded that an FBI agent had contacted him and had "made an accusation that I had tried to bribe this Fender [a Board field examiner]—never was nothing about it" (Tr. 2495).

Petitioner's counsel then stated, "Your Honor, I renew my motion in respect to this material * * *—the material that I requested on this issue" (Tr. 2495-2496).[2] The Assistant United States Attorney responded that "I don't know what you're talking about" and stated that he had no materials concerning an FBI investigation of the Labor Board matter (Tr. 2496). After some further testimony by Cox about

[2] The day before, petitioner's counsel had filed a written motion for production of the " 'entire NLRB file on the Walter B. Cox grievance' " and the " 'entire Federal Bureau of Investigation file' dealing with Cox's conduct in the NLRB matter" (Pet. 4-5). The written motion was apparently prompted by tape recordings made by Cox of various telephone conversations, which Cox had furnished to the prosecution and the prosecution had furnished to the defense prior to trial. One of the taped conversations was a call to Cox by an FBI agent asking for an interview with Cox.

his contact with the FBI, the court stated (Tr. 2497), "We hold there'd be compliance in the record at the moment," and the matter was not pursued.

After the trial and verdict, the Assistant United States Attorney discovered that the files of the United States Attorney's office in Fort Wayne[3] contained a letter from the Board to the United States Attorney requesting an investigation of Cox's alleged attempt to bribe Fender, and that the Hammond United States Attorney's office possessed an FBI report of an investigation of the incident, and a report by the United States Attorney's office declining to prosecute on grounds of insufficient evidence (H. Tr. 28-36, 83-87, 148).[4] The Assistant furnished these documents to the court and to petitioner's counsel, and the government joined petitioner in moving the court of appeals to remand for an evidentiary hearing on petitioner's motion for a new trial.[5]

An evidentiary hearing was held. Fender testified and produced at the hearing his own written summary of his interview with Cox (Pet. App. 32a-35a). Fender had prepared the summary in affidavit form for Cox's signature, but Fender testified that Cox

[3] The trial was held in South Bend, Indiana and prosecuted by the United States Attorney's local office in that city.

[4] "H. Tr." refers to the evidentiary hearing on petitioner's motion for new trial held on August 31, 1976.

[5] Petitioner's new trial motion and the evidentiary hearing also concerned two other matters that the government allegedly withheld improperly from petitioner, but petitioner does not challenge here the adverse rulings of the courts below as to those matters.

refused to read or sign the summary (H. Tr. 160-161, 178), thus confirming Cox's own trial testimony on the matter. Fender's summary pertained to Cox's general knowledge of the fraudulent scheme perpetrated by Walsh personnel, but "[w]ithout revealing further details and the mass of evidence within my [Cox's] knowledge and possession" (Pet. App. 34a). The summary made no mention of any bribery attempt by Cox.

The district court denied petitioner's motion for a new trial on the grounds, *inter alia*, that the nondisclosure of the various documents did not violate *Brady* because they were not material (Pet. App. 11a)[6] and that Fender's summary was not a "statement" by Cox within the meaning of the Jencks Act since it was not seen by Cox and since Cox indicated that he would not in any event swear to it (Pet. App. 12a). The court of appeals affirmed those determinations (Pet. App. 26a-31a) on the grounds that petitioner was aware of the bribery accusation against Cox, that petitioner could have subpoenaed Fender himself (and later did so), that petitioner could not in any event have used any documents as extrinsic evidence to impeach Cox's denial of having bribed Fender, and that Fender's summary was not in any event a document in the possession of the prosecution for purposes of *Brady* or the Jencks Act.

[6] The district court also expressed the view that Fender's summary was not in any event "'in the possession of the United States'" within the meaning of the Jencks Act (Pet. App. 13a-14a).

Petitioner claims that the nondisclosure of "the NLRB file regarding Walter Cox's unfair labor practice complaint and alleged bribe attempt" (Pet. 9) violated the *Brady* rule and the Jencks Act, and he contends that the court of appeals erred in concluding that "the file" was not in possession of the government for purposes of *Brady* or the Jencks Act. Although it is not clear from the petition, we shall assume that petitioner's contentions pertain both to the documents in possession of the NLRB (*i.e.*, Fender's summary) and to those in the United States Attorney's office and Hammond in Fort Wayne (*i.e.*, the NLRB letter, the FBI report, and the declination of prosecution). The courts below properly rejected petitioner's contention.

a. With respect to the *Brady* claim, the record amply supports the district court's conclusion that the documents were not "of a 'material' nature" (Pet. App. 11a). Fender's summary of his interview with Cox had no bearing on Cox's alleged bribery or the FBI investigation, which was the reason given for the production request.[7] Although petitioner now claims that that document had other impeachment value, it in fact did no more than confirm Cox's trial testimony concerning his knowledge of and involvement in fraudulent practices by Walsh personnel (see Pet. App. 32a-35a). There is no basis for petitioner's

[7] At trial petitioner's counsel stated (Tr. 2496): "[W]e can impeach the witness because he said he was investigated by the FBI."

claim (Pet. 13-14) that Cox's testimony incriminating petitioner was shown to be false because Fender's summary did not itself incriminate petitioner. The summary explicitly indicated that Cox had not "reveal[ed] further details and the mass of evidence within my knowledge and possession * * *" (Pet. App. 34a). Moreover, Cox indicated at trial that he had made some statements to the NLRB that he had refused to endorse, and petitioner was not foreclosed from examining Cox as to the substance of those statements.

The other documents were also not material to impeaching Cox's credibiilty as materiality has been delineated in *Brady*, *supra*, *Giglio* v. *United States*, 405 U.S. 150, and *United States* v. *Agurs*, 427 U.S. 97. Those documents merely confirmed what Cox testified to at trial—that he had been accused of bribing Fender and that nothing had come of the accusation or the FBI investigation. Moreover, as the court of appeals noted (Pet. App. 28a, n. 12), none of the documents could have been used by the defense to rebut Cox's sworn testimony at trial denying the bribery charge, since Fed. R. Evid. 608(b) adopts the traditional rule that a party may not attack the credibility of a witness by use of extrinsic evidence of the witness's past conduct. Finally, in view of all the other facts elicited by the defense on cross-examination tending to impeach Cox's credibility, the documents in question could have had little if any impact on the issue

of Cox's credibility.[8] See *United States* v. *Rosner*, 516 F.2d 269, 273-278 (C.A. 2), certiorari denied, 427 U.S. 911.

Since the record amply supports the district court's view that the documents were not material within the meaning of the *Brady* rule, it is unnecessary to decide whether the court of appeals correctly held that the documents were not in the possession of the prosecution for purposes of that doctrine. In any event, we submit the court of appeals' conclusion was correct.

The court of appeals apparently focused on Fender's summary and not on the documents in the United States Attorney's offices in Fort Wayne and Hammond, and petitioner's argument also focuses on that document (see Pet. 9-14). We believe the court of appeals correctly concluded that, in the circumstances of this case, the *Brady* rule should not apply to that document. The Labor Board was in no way involved with this prosecution, and its connection to the case was wholly peripheral. Petitioner has never questioned the prosecutor's assertion that he had no knowledge of the

[8] The fact that petitioner made a specific request for the documents does not, contrary to petitioner's assertion (Pet. 9, 13), establish any presumption that *Brady* was violated. The *Brady* rule still requires that the documents be favorable to the defense and material to the issue of guilt or innocence or to the credibility of a witness. Although *Agurs* indicates that the standard of materiality may vary depending on whether a specific request has been made, 427 U.S. at 106, the Court made clear that materiality must still be established before a *Brady* violation can be found. 427 U.S. 104, 112-113. See also *Giglio* v. *United States*, *supra*, 405 U.S. at 154; *Calley* v. *Calloway*, 519 F.2d 184, 222 (C.A. 5), certiorari denied, *sub nom. Calley* v. *Hoffman*, 425 U.S. 911.

matter, and petitioner's mid-trial request for the documents gave the prosecutor little opportunity to initiate an inquiry. Furthermore, as the court of appeals noted, petitioner was aware of the Board matter and the alleged bribe and could have sought or subpoenaed the materials from the Board. In those circumstances, the proposition that either *Brady* or the Jencks Act would pertain to a document in the possession of a Labor Board field examiner would, as the district court said (Pet. App. 14a), "impose a staggering duty upon the United States Attorneys' offices. The prosecutor would be, in effect, obliged to contact every executive agency to see if a witness had made a statement to that office." *United States* v. *Deutsch*, 475 F.2d 55 (C.A. 5), on which petitioner relies for an alleged conflict (Pet. 10-14), is readily distinguishable. In *Deutsch* the defendant was prosecuted for attempting to bribe a Post Office employee, and the materials in question were that employee's personnel records. In holding that the Post Office must be considered part of the government for *Brady* purposes, the court stressed that the Post Office was "closely connected" to the prosecution in that case. 475 F.2d at 57. See also *United States* v. *Haldeman*, 559 F.2d 31, 74, n. 74 (C.A. D.C.), certiorari denied *sub nom. Ehrlichman* v. *United States*, 431 U.S. 933 (limiting *Deutsch* to instances where the government agency possessing requested documentary material is "allied with the prosecution"). Here, in contrast, the Labor Board, an inde-

pendent agency, had no connection with the prosecution.[9]

b. Petitioner's Jencks Act claim (Pet. 15-17) relates only to Fender's summary of his interview of Cox.[10]

The district court correctly ruled that Fender's summary was not a "statement * * * of the witness" within the meaning of the Jencks Act. Not only was the summary not reviewed by Cox, but also he expressly refused to adopt or approve it. See 18 U.S.C. 3500(e)(1).[11] See also *Goldberg* v. *United States*,

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[9] If they were material, the documents in the possession of other offices of the United States Attorney would present a more difficult question. Cf. *Giglio* v. *United States*, 405 U.S. 150, where the Court held that material information possessed by one Assistant United States Attorney must be attributed to the Assistant prosecuting the case, notwithstanding the "burden [this rule places] on the large prosecution offices * * *" 405 U.S. at 154. Whether that rule would apply to separate offices is unclear.

[10] The other documents are not even arguably statements of Cox.

[11] The district court also correctly rejected the claim that the document was producible under Section 3500(e)(2) as a "substantially verbatim recital of an oral statement made by [the] witness." Fender testified that he prepared the document on the basis of the information Cox supplied to him, and that he had intended to show the document to Cox to make "any necessary corrections," but that Cox refused to read it (H. Tr. 161, 178). As the district court stated (Pet. App. 12a-13a):

> Of all the possible statements under the Jencks Act, a handwritten account of an interview pursuant to 18 U.S.C. 3500(e)(2) is unquestionably the least reliable and trustworthy. * * * The possibilities of inaccuracy and distortion are most obviously present where one man

425 U.S. 94, 110-111, n. 19 ("This requirement [of 18 U.S.C. 3500(e)(1) that the witness sign or otherwise adopt or approve the statement] clearly is not met when the lawyer does not read back, or the witness does not read, what the lawyer has written.").[12]

2. The court of appeals correctly rejected petitioner's claim (Pet. 18-22) that the district court erred in admitting evidence of other fraudulent acts by other Walsh employees. That issue in any event turns

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drafts a handwritten account of a conversation and the other participant refuses to acknowledge it as accurate.

See also *Goldberg* v. *United States*, 425 U.S. 94, 114, n. 4 (Stevens, J., concurring) and 126 (Powell, J., concurring).

[12] Accordingly, it is also unnecessary to decide whether the court of appeals correctly concluded that the summary was not in the possession of the United States within the meaning of the Jencks Act. In accord with the view of the court of appeals here, several courts have held that statements of witnesses are not producible under the Jencks Act unless they are in possession of the prosecution or some related investigative agency. See *United States* v. *Dansker*, 537 F.2d 40, 61 (C.A. 3), certiorari denied, 429 U.S. 1038 (statement in presentence report prepared by probation department not producible); *Augenblick* v. *United States*, 377 F.2d 586, 597-598 (Ct. Cl.), reversed on other grounds, 393 U.S. 348 (Jencks Act applies only to statements in possession of "investigating officials").

Petitioner relies on *Harvey Aluminum, Inc.* v. *National Labor Relations Board*, 335 F.2d 749 (C.A. 9), and *United States* v. *Bryant*, 439 F.2d 642 (C.A. D.C.), but those cases are distinguishable. *Harvey Aluminum* involved an unfair labor practice proceeding to which the Jencks Act itself does not apply, and the statement there was in the possession of the FBI. In *Bryant*, the statement was in possession of the Bureau of Narcotics and Dangerous Drugs, a law enforcement agency, and had been destroyed by that agency.

on the particular facts of this case and does not warrant this Court's review.

The evidence challenged by petitioner showed that in the course of earlier construction projects other supervisory personnel at Walsh engaged in overcharge schemes similar to the ones charged in the indictment (see, *e.g.*, Tr. 1481, 2160). Although the evidence did not establish petitioner's participation in those schemes, it did show that he was aware of their details. For example, as the court of appeals noted, the evidence showed that an auditor for National Steel brought to petitioner's attention numerous overcharges that were similar to the ones found at Burns Harbor and that were evidenced by employee time cards. The evidence also showed that six months after the National Steel audit, petitioner ordered employee time cards destroyed at Burns Harbor (Pet. App. 20a-21a, n. 3).[13]

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[13] Petitioner also contends that evidence concerning fraudulent overcharges at the Sparrows Point, Maryland, and Weirton, West Virginia projects were also improperly received (Pet. 20). As the court of appeals noted (Pet. App. 17a, n. 2) testimony concerning the Sparrows Point project was not offered to implicate petitioner but only to show the existence of a fraudulent scheme in which both Walsh Contracting and Bethlehem Steel officials participated (Tr. 1481). An instruction tendered by petitioner was given immediately after such testimony to remind the jury that the evidence was not offered on the issue of petitioner's state of mind but exclusively for its value in tending to show the existence of a scheme (Tr. 1769-1770). Additionally, the National Steel auditor who testified concerning the preceding fraudulent overcharges was specifically instructed by the prosecutor to confine his testimony to the Great Lakes and Midwest projects and not to include

The evidence of other fraudulent acts was not admitted to show petitioner's criminal disposition but was properly admitted under Fed. R. Evid. 404(b) to show petitioner's intent, plan, and knowledge. The fact that petitioner did not specifically contest the issue of intent is immaterial; as the court of appeals noted (Pet. App. 19a), specific intent to defraud is an essential element of mail fraud that the government was required to prove beyond a reasonable doubt. See *United States* v. *Marine*, 413 F.2d 214, 216 (C.A. 7). Moreover, since petitioner was not a participant in these other crimes, the danger that the evidence of them would prejudicially tar petitioner as a "bad man" in the eyes of the jury was minimal.[14]

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the Weirton project—of which petitioner had no knowledge. Since the witness complied with this instruction, there was hardly any testimony concerning practices at that project (Tr. 2143, 2148, 2159).

[14] If evidence of other crimes or acts is relevant to such issues as intent, plan or knowledge, it is not material that the defendant was not a participant in those acts. As the court of appeals stated (Pet. App. 21a, n. 4), "Rule 404(b) does not require the defendant to be an active participant in the other similar acts," and there may be many instances when a crime by another person is highly relevant to the guilt or innocence of the defendant—for example, where the defendant is accused of murdering a person in retaliation for that person's earlier crime against him, or where the defendant is charged with committing a crime with an accomplice that is identical in *modus operandi* to a previous crime committed by the accomplice. It is only where the defendant's participation itself is what makes the prior crimes relevant that the courts have required convincing evidence that the defendant was in fact a participant. See, *e.g.*, *United States* v. *Jaqua*, 485 F. 2d 193 (C.A. 5); *United States* v. *Vosper*, 493 F. 2d 433, 437 (C.A. 5), relied on by petitioner (Pet. 19).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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